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In the

Supreme Court of the United States

OCTOBER TERM, 1967

AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590, et al.,

Petitioners,

v.

LOGAN VALLEY PLAZA, INC. and WEIS MARKETS, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR THE AMERICAN RETAIL FEDERATION AS AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

The American Retail Federation (hereafter referred to as the "Federation") is an organization composed of 73 national and state retail associations. The membership of these associations consists of a wide variety of retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry.

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* Pursuant to Rule 42, §2 of the Rules of the Court, there have been lodged with the Clerk of the Court the written consents of counsel for the respective parties herein to the filing of this Brief *Amicus Curiae.*

The interest of the Federation, in urging affirmance of the decision of the court below, is predicated upon the potentially substantial and far-reaching consequences that any decision in this case may have for the retail industry.

This case has been phrased by Petitioners, and by the *amicus* briefs in support of Petitioners' position, as a "shopping center" case.[1] This characterization, however, is misleading and an oversimplification; the term "shopping center" simply will not function as a "phrase of art."[2] Rather, although the term has become broadly descriptive of certain business operations—and, indeed, will be used as a term of reference herein—"shopping centers" are not so precisely definable and cannot be so clearly differentiated from other forms of retailing that any rules here enunciated can be regarded as applicable only to a specific and delimited classification of enterprises.[3]

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[1] See Petitioners' Brief, p. 2; Brief of *amicus* Retail Clerks International Association (hereafter referred to as RCIA, pp. 1-4; Brief of *amicus* National Labor Relations Board (hereafter referred to as NLRB), p. 1 and Brief of *amicus* American Federation of Labor and Congress of Industrial Organizations (hereafter referred to as AFL-CIO), p. vi.

[2] Brief of RCIA, fn. 1. The footnote proceeds to give, for example, "*one* definition" from WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY that it is a group of retail stores "*usually* with general parking space and *usually* planned to serve a community or neighborhood" and to further point out that there "are *three of four generally accepted categories of shopping centers, variously defined.*" (All italics supplied.)

[3] Cf., e.g., *Freeman* v. *Retail Clerks Union*, 45 LRRM 2334, 2337 (Super. Ct., 1959), rev'd. on preemption grounds, 58 Wash. 2d 426, 363 P. 2d 803 (1961):

> "The term 'shopping center' can be applied to any number and variety of merchandising and service

Shopping centers can be of practically any size, ranging from large regional shopping centers to local neighborhood centers with but a few small independent stores.[4] In fact, the relatively smaller shopping centers predominate the field.[5] Shopping centers can also be of virtually any shape. Thus, the only common characteristics of all shopping centers are that they (1) offer a variety of-

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[3] (Continued)

operations. What is a shopping center? Does a shopping center become such by reason of having seven, seventeen or seventy places of business? Does it become a shopping center because it is an outdoor operation? One of the reasons that the contention of the defendants cannot be a rule of law is because there is no legally acceptable definition of the phrase 'shopping center.'"

[4] Cf., e.g. the "shopping center" described in *Thomas W. Finucane Corp.* v. *State,* 52 Misc. 2d 462, 276 N.Y.S. 2d 225 (Ct. Cl., 1966) an eminent domain case, which consisted of a one-story masonry block building containing 17,463 square feet. There were three tenants in the building—a drug store, a chain grocery store and a dry cleaning establishment.

[5] As of January, 1965, there were a total of 8,076 shopping centers in the United States. Approximately 60% or 4,925 of the centers had a gross leaseable area of less than 100,000 square feet—which is an area smaller than 500 by 200 feet—with an average leaseable area of 56,000 square feet. Another 25% or 2,066 centers had a gross leaseable area of 200,000 square feet or less (the equivalent of 500 feet by 400 feet). These two groups combined accounted for 57% of the shopping center business. Only approximately 700 of the 8,000 centers are "medium sized" (200,000 to 400,000 square feet) and but 400 are large or regional shopping centers. See Applebaum, *Consumption and the Geography of Retail Distribution in the United States,* Michigan State University Business Topics, Summer 1967, pp. 28-29. Similar statistics, prepared by W. Donald Calomiris, president of the Institute of Real Estate Management, are quoted in the magazine of RCIA, *The Retail Clerks Advocate,* August, 1967, p. 6.

goods and services to the public, (2) are located on single tracts of land with definite established boundaries and (3) provide parking area for the customers—significantly, characteristics also present in and not substantially different from those of other types of retail enterprises or establishments which are not generally regarded as "shopping centers."

For example, there are many single unit department stores or discount houses which offer not only their own merchandise but also the merchandise of others through leased departments or concessions and which have parking areas open to the public. As one commentator observed, such an enterprise "is essentially a shopping center by itself, under one roof."[6] In addition, there are large single retail stores, frequently a branch of a national chain, located on their own tract of land with a substantial public parking area.[7] There are retail enterprises which, instead of being constructed on a horizontal plane, as in the cases of the sprawling one-story suburban shopping center or free standing store, are constructed on a vertical plane because of space limitations as those which exist in downtown locations.[8] Similarly situated

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[6] Applebaum, *id.* at 31.

[7] See, for example, *People* v. *Goduto*, 21 Ill. 2d 605, 174 N.E. 2d 385 (1961), *cert. den.*, 368 U.S. 927, involving a Sears, Roebuck and Co. retail store. Such stores are generally described as "free standing" stores. Since these stores (as well as discount stores) are usually large operations, the goods and services offered by them will frequently substantially exceed those offered in the smaller or even medium-size "shopping centers".

[8] See Brief of RCIA, p. 7, referring to shopping centers that "have not only spread out, but they are building up." These centers frequently have customer parking areas constructed on several levels attached to the store with entrance into the store directly from the various levels of the parking area.

also are those multiple stores, shops and offices, located within a single building with a common entranceway, stairwells and corridors, or the multiple manufacturing or retail establishments located within industrial parks and connected only by means of a series of private roads fronting on a public artery. All such enterprises, regardless of size, shape, or the terms used to describe them, are open to the community that makes the center or store "a market place whose very being inheres in its openness to the public."[9]

The interest of the Federation is predicated on the potentially substantial and far-reaching consequences that any decision herein may have for all methods of retail operation, rather than just "shopping centers" however they may be defined. The concern of the *amicus* is that the Court, in formulating the principles to resolve the instant controversy, should be aware of the ramifications thereof on all of these retail establishments as they may be affected by unlawful entry upon their property, whether by a labor union to picket for a variety of conceivable objectives[10] or by other organizations or individuals to propagandize other messages.[11]

SUMMARY OF ARGUMENT

The states have traditionally exercised a substantial and legitimate interest in regulating unauthorized entry upon the property of its citizens. This responsibility has been recognized not only as a basis for protecting the property rights involved and determining matters of

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[9] Brief of Petitioners, p. 12.

[10] See, e.g., Brief of RCIA, p. 9.

[11] E.g., the factual situation involved in *State* v. *Quinnell*, ... Minn. ....., 151 N.W.2d 598 (1967), or *Hughes* v. *Superior Court*, 339 U. S. 460.

at preventing effectuation of that policy." *International Bhd. of Teamsters* v. *Vogt, Inc.*, 354 U.S. 284, 293.

The Supreme Court of Pennsylvania stated that the issue before it was whether "in the factual matrix of the case at bar, the *conduct* of the pickets constituted an invasion of the private property of Weis and/or Logan," and whether "the parcel pick-up zone and the parking areas constitute private or quasi-public property." (Emphasis added.) It stated that the "resolution of that question involves the consideration of many factors" (R. 104-05). It proceeded to analyze the "social and economic factors," *International Bhd. of Teamsters* v. *Hanke*, 339 U.S. 470, 474, to be considered.

It pointed out that "the success of both Weis' store and the Logan shopping center depends upon the extent to which both are able to induce and persuade the public to visit and shop in the area" (R. 104). But, said the court, it "lacks any basis in law or common sense" to hold that by such solicitation of patronage "these property owners (also) solicited the use of their property by persons who were attempting to discourage the public from patronizing the store facilities . . ." (R. 106).

The court thus concluded that the property on which the picketing took place was private property and that "such use (picketing) constituted a trespass which very properly was restrained" (R. 106). In so declaring, it reaffirmed its public policy that it was "clear beyond question" that "the Commonwealth has not only the power but the duty to protect and preserve the property of its citizens from invasion by way of trespass . . ." (R. 104).

Similarly this Court stated:

> "The State, no less than a private owner of property, has power to preserve the property under its control

for the use to which it is lawfully dedicated." *Adderley* v. *Florida*, 385 U.S. 39, 47.

But the union asserts that although "the property is private . . . the use is public." (Brief for Petitioners, p. 12.) Was it a public use "to which (the parcel pick-up zone) was lawfully dedicated?" *Adderley* v. *State of Florida, supra.* The Supreme Court of Pennsylvania responded that "neither the record nor common sense would justify such a finding" (R. 104).

Certainly, there was no common-law dedication.[11] In the present case, there was a clear intention not to dedicate, but to retain control and exercise exclusive ownership. The no-trespass rule posted by the owner of the property, Weis, evidences an intent not to open the area to the public's general use. Nor could any dedication have taken place in the few days the store was opened prior to the commencement of the picketing. Certainly, under these circumstances, the parcel pick-up area and the front porch owned by Weis could not be deemed to have been dedicated to public use.

The pickets in the instant matter were all employees of Weis' competitors.[12] *Indisputably, Weis did not invite its competitors' employees (the pickets) to confront Weis' customers at the threshold of Weis' property, so that they could there promote their employers' businesses, and destroy that of Weis.*

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[11] In 3 American Law of Property, §12.132 (1952), "Dedication" is defined as: "the devotion of land to a public use by an unequivocal act of the owner of the fee manifesting an intention that it shall be accepted and used presently or in the future for such public use." See also, 4 Tiffany, Real Property, §1098, p. 329 (3rd ed., 1939).

[12] In distinguishing a prior holding, the Supreme Court of Pennsylvania took note of the fact that the pickets were non-employees. The Supreme Court, of course, did not "justify the prohibition of peaceful picketing" based on this fact, as the union incorrectly argued in its Brief at p. 37, and elsewhere.

The objective of these pickets was the antithesis of lawful business invitees. "To hold that (Weis) solicited the use of this property by persons who were attempting to discourage the public from patronizing the store facilities lacks any basis in law or common sense," stated the Supreme Court of Pennsylvania, in affirming the decree of the trial court (R. 106).

It is submitted that the courts below struck a reasonable balance after considering the social and economic factors in this case. Under these circumstances, their judgment should be accorded a weighty title of respect by this Court, and affirmed.

POINT IV

THIS COURT RECOGNIZES THAT DIVERGENT SOCIAL AND ECONOMIC VIEWS HELD BY STATES MAY RESULT IN THEIR STRIKING DIFFERENT BALANCES.

In affirming an Illinois judgment upholding an injunction against picketing, this Court stated:

> "That other states have chosen a different path in such a situation indicates differences of social view in a domain in which states are free to shape their local policy." *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 296.

This Court has also noted that:

> "The policy of a state may rely for the common good on the free play of conflicting interests and leave conduct unregulated. Contrariwise, a State may deem it wiser policy to regulate." *Hughes* v. *Superior Court*, 339 U.S. 460, 468.

Whichever course the state takes, this Court will not assess the wisdom of its policy. *Carpenters Union* v. *Ritter's Cafe*, 315 U.S. 722, 725; *Giboney* v. *Empire Storage Ice Co.*, 336 U.S. 490; *Building Service Employees Union* v. *Gazzam*, 339 U.S. 532, 536-37.

Accordingly, that California has struck a different balance, *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Union*, 61 Cal. 2d 766, 394 P. 2d 921, *cert. denied*, 380 U.S. 906, only underscores the fact that states have different social and economic views, resulting in different public policy.

California's public policy relative to the respective rights of pickets and property owners was enacted into statute form. The California Supreme Court held that the statute "specifically subordinated the rights of the property owner" to that of a labor union, and excepted picketing by a labor union from its criminal trespass statute, *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Union*, *supra* at 769. Thus, it relied on its statutory declaration of public policy, when it weighed the competing interests of a retailer in a shopping center, against that of a union engaged in picketing therein. It had no difficulty, therefore, in holding that the scales tipped in favor of the union.

That Pennsylvania balances the interests differently, is not unconstitutional, for the Constitution does not command "logical symmetry." *Hughes* v. *Superior Court*, 339 U.S. at 468.

POINT V

THE NARROWLY DRAWN INJUNCTION HEREIN IS VALID UNDER THE FEDERAL CONSTITUTION.

The injunction issued by the trial court did not enjoin all picketing. It merely regulated the place of the picketing, the number of pickets, and prohibited physical interference and violence (R. 102, 102 n.4). It expressly permitted continued picketing elsewhere, where the pickets "will be still in the vicinity and clearly within view of the Weis supermarket," and where the pickets' banners "will be plainly legible to passing motorists . . ." (R. 98).

This Court has sanctioned the use of narrowly drawn injunctions. In *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 298, this Court stated:

> "The injunction is confined to conduct near stores dealing in respondent's milk, and it deals with this narrow area precisely. . . . An injunction so adjusted to a particular situation is in accord with the settled practice of equity, sanctioned by such guardians of civil liberty as Mr. Justice Cardozo."

In *Building Service Employees Union* v. *Gazzam*, 339 U.S. 532, this Court noted, in finding no unwarranted restraint of picketing, that:

> "The injunction granted was tailored to prevent a specific violation of an important state law. The decree was limited to the wrong being perpetrated. . . ." 339 U.S. at 541.

In the instant matter there was no unwarranted restraint of picketing. The injunction granted was tailored to prevent a "specific violation of an important state law." The

decree was limited to the "wrong being perpetrated," namely, the tort of trespass. It did not "reach the union's conduct in its entirety." *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.*, 353 U.S. 20. It expressly recognized that it did not have the right "totally to prohibit the picketing" (R. 96).

It is submitted, therefore, that this narrow limitation of picketing accommodated the interests of all parties. The union's opportunity to communicate with the public was preserved and enlarged, Weis' property rights were protected and the public's right to trade without interference was secured.

POINT VI

THE UNION'S FEDERAL PREEMPTION DEFENSE WAS NEITHER RAISED NOR ARGUED BEFORE THE SUPREME COURT OF PENNSYLVANIA. THEREFORE, THIS DEFENSE MAY NOT BE RAISED HERE.

A. *This Court Will Not Entertain Defenses That Were Not Raised Before A State Supreme Court.*

Under an "unbroken line of precedent," this Court has held that contentions or defenses not raised before a State Supreme Court may not be entertained here. *Beck* v. *Washington*, 369 U.S. 541, 553; *State Farm Mut. Auto Ins. Co.* v. *Duel*, 324 U.S. 154; *Safeway Stores* v. *Oklahoma Grocers*, 360 U.S. 334; *Wilson* v. *Cook*, 327 U.S. 474; *Blair* v. *Oesterlein Co.*, 275 U.S. 220. "It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a federal nature." *Whitney* v. *California*, 274 U.S. 357, 362. A failure to pursue properly the question of federal preemption on appeal in a state court proceeding, precludes this Court from review of that question. *Safeway Stores* v. *Oklahoma Grocers*, 360 U.S. 334, 342 n.7. Thus, this Court is limited in the scope of its review of the judgment of the Supreme Court of Pennsylvania to federal issues which were properly raised before that tribunal.

B. *The Defense Of Federal Preemption Was Never Presented To The Supreme Court Of Pennsylvania For Its Determination, Nor Did That Court Address Itself To The Question.*[13]

1. The Rules of the Supreme Court of Pennsylvania require that questions be properly presented.

In order to properly raise a question before the Supreme Court of Pennsylvania, the question must be included in the Statement of Questions Involved. *Rules Of The Supreme Court of Pennsylvania*, Rule 59. The Rule is mandatory:

> "The statement of the questions involved must set forth each question separately, in the briefest and most general terms, without names, dates, amounts or particulars of any kind, and whenever possible, each question must be followed immediately by an answer stating simply whether it was affirmed, negatived, qualified or not answered by the court below. . . . *This rule is to be considered in the highest degree mandatory, admitting of no exception; ordinarily no point will be considered which is not thus set forth in or necessarily suggested by the statement of questions involved.*" (Emphasis added.) Pa. Sup. Ct. R. 59 (as amended to Jan. 1, 1967).

The Supreme Court of Pennsylvania has consistently held that it will refuse to consider questions not presented as the Rule dictates. The point or defense is considered abandoned or waived. *Dunmore* v. *McMillan*, 396 Pa. 472, 152 A. 2d 708; *Kuhns* v. *Brugger*, 390 Pa. 331, 135 A. 2d

[13] In its Brief before this Court, the union notes that: "The Pennsylvania Supreme Court did not address itself to the question of federal preemption." (Brief for Petitioners, p. 10.)

395; *Kerr* v. *O'Donovan*, 389 Pa. 614, 134 A. 2d 213; *Blue Anchor Overall Co.* v. *Pennsylvania Lumbermens Mut. Ins. Co.*, 385 Pa. 394, 123 A. 2d 413; *Snyder Estate*, 346 Pa. 615, 31 A. 2d 132, *cert. denied*, 320 U.S. 750, rehearing denied, 320 U.S. 812; *Commonwealth* v. *Cauffiel*, 298 Pa. 319, 148 Atl. 311.

2. The defense of federal preemption was not included in the union's statement of questions involved.

The union, in its Brief filed with the Supreme Court of Pennsylvania, set forth the following as its Statement of Questions Involved.[14]

"STATEMENT OF QUESTION INVOLVED"

"Did the lower court err in granting a Preliminary Injunction without hearing and thereafter, denying and dismissing appellant's motion to dissolve or modify said injunction and further, continuing said Preliminary Injunction, where in a suit in equity by the owner of a shopping center and one of its tenants it is established that appellant-union peacefully picketed near tenant's building within the confines of said shopping center; that no picketing efforts were directed toward the shopping center or other tenants; that picketing efforts were merely to inform the public of the labor dispute?

"Negatived by the Court below by the granting and continuance of a Preliminary Injunction which restrained appellant-union from picketing within the entire limits of the shopping center area." (Emphasis in original.)

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[14] The Union's "Brief for Appellants" was lodged with this Court on November 20, 1967.

It is crystal clear, and beyond peradventure, that the union did not include the question of federal preemption in its Statement.[15] Thus, since it is mandatory that "no point will be considered which is not thus set forth," (Rule 59), "the Pennsylvania Supreme Court did not address itself to the question of federal preemption." (Brief for Petitioners, p. 10.) Consequently, the defense of federal preemption was waived before that court. Accordingly, it may not now be raised before this Court.

This Court so held in *Beck* v. *Washington*, 369 U.S. 541. In that case, this Court was confronted with a similar state Rule of Court,[16] and a similar failure by a petitioner to comply. This Court flatly refused to entertain an argument based on a point not properly raised.

In an analogous case, *CIO* v. *McAdory*, 325 U.S. 472, one of the questions before this Court was whether a state statute was in conflict with the National Labor Relations Act. However, the question of federal preemption had not been considered by the Alabama Supreme Court. In interpreting an appellate rule very similar to Rule 59 of the Supreme Court of Pennsylvania, this Court found that the Alabama Supreme Court would not consider errors which had not been assigned or which had not been specifically and precisely raised in the assignments of error. This Court held in that case that because of the failure of the parties to comply with the Alabama Supreme Court Rules, this Court would not consider the preemption issue.

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[15] Contrast the specific presentation of the defense of federal preemption in the "QUESTIONS PRESENTED" to this Court in Brief for Petitioners, p. 2 with its complete omission in the court below.

[16] "Rule 43 of the Rules on Appeal, Revised Code of Washington, provides that '[n]o alleged error of the superior court will be considered by this court unless the same be definitely pointed out in the "assignments of error" in appellant's brief.'" 369 U.S. at 552.

"Since the State Supreme Court did not pass on the question now urged, and since it does not appear to have been properly presented to that court for decision, we are without jurisdiction to consider it in the first instance here. *Caperton* v. *Bowyer*, 14 Wall. 216, 236; *Hulbert* v. *Chicago*, 202 U.S. 275, 280, 281; *Dorrance* v. *Pennsylvania*, 287 U.S. 660; *Chandler* v. *Manifold*, 290 U.S. 665; see also *Flournoy* v. *Wiener*, 321 U.S. 253; *Charleston Assn.* v. *Alderson*, 324 U.S. 182, 185 and cases cited." 325 U.S. at 477.

In another case where this Court was confronted with a defense that had not been asserted below (the petitioner having failed to comply with the State Supreme Court Rules), this Court refused to listen to the plea and stated:

"The North Carolina Supreme Court did not decide this asserted federal question. We have found that it did not do so because of the requirements of rules of state procedural law within the Constitutional power of the States to define, and here clearly delineated and evenhandedly applied. We have no choice but to determine that this appeal must be dismissed because no federal question is before us. That determination is required by principles of judicial administration long settled in this Court. . . ." *Wolfe* v. *North Carolina*, 364 U.S. 177, 196, rehearing denied, 364 U.S 856.

3. The defense of federal preemption was not argued before the Supreme Court of Pennsylvania.

Rule 55 of the Supreme Court of Pennsylvania requires that briefs filed with it contain a "Summary of Argument" and "Argument."

Rule 61½ of the Supreme Court of Pennsylvania requires that the "Summary of Argument" contain a concise summary of the party's arguments in the case.

In its "Summary of Argument," the union urged that: (1) a labor dispute existed within the meaning of the Pennsylvania Labor Anti-Injunction Act and thus could not be enjoined; (2) the picketing was peaceful; (3) there was no trespass, since the property, while technically private, was quasi-public in nature; (4) the right of control "is subordinated to the constitutional rights of the members of the public who use the property." (Brief for Appellants, p. 6.)

Rule 62 requires that each question before the court be argued under separate headings, which headings should indicate the particular point treated therein.

Under "Argument for Appellant" the union set forth its arguments concerning freedom of speech, the peaceful nature of its picketing, the quasi-public character of the property, and the inapplicability of the Pennsylvania Anti-Injunction Act. (Brief for Appellants, pp. 7-21.) It declared that "the problem of trespassing" was "the real issue here involved." (Brief for Appellants, p. 14.)

4. The defense of federal preemption was not argued before the trial court.

On January 19, 1966, the union filed its "Brief for and on behalf of Defendant in Support of its Motion to Dissolve or Modify the Preliminary Injunction," together with a Reply Brief.[17]

The arguments presented were similar to the arguments later presented to the Supreme Court of Pennsylvania, discussed above. The union did not argue federal preemption in either its Brief or Reply Brief. On the contrary, the

[17] Petitioners' "Brief in Support of its Motion to Dissolve or Modify the Preliminary Injunction," including the attached Reply Brief, was lodged with this Court on November 29, 1967.

Opinion of the trial court recited that the union conceded the court's jurisdiction.[18]

5. The Supreme Court of Pennsylvania has decided questions of federal preemption when properly raised.

The Supreme Court of Pennsylvania has decided many cases in which this defense has been raised. Whenever it is presented, it is resolved by the court. See, e.g., *City Line Open Hearth, Inc.* v. *Hotel Employees Union*, 413 Pa. 420. 427, 197 A. 2d 614, and cases cited; and *Lay* v. *Local 174, International Bhd. of Electrical Workers*, 427 Pa. 387, 235 A. 2d 402, and cases cited.

In *Lay*, the most recent case in which the defense of preemption was raised before the Supreme Court of Pennsylvania, the Court discussed the problem at great length. It set forth the elements a party must prove in order to establish that the state court is ousted of jurisdiction:

> "(I)t is necessary, in this class of cases, for the parties who claim that the N.L.R.B. has exclusive jurisdiction to prove, inter alia, (1) that the employer was engaged in interstate commerce . . . and (2) that the challenged activities were expressly or arguably within the jurisdiction of the N.L.R.B. . . ." 427 Pa. at 389, 235 A. 2d at 403.

The Supreme Court of Pennsylvania further noted:

> " 'Furthermore, the jurisdiction of the N.L.R.B. must be readily ascertainable from the averments of fact con-

[18] "We need involve ourselves in no detailed discussion of our jurisdiction and power to regulate the location of picketing of the type here engaged in so as to prevent trespassing on private property; defendant union concedes such authority, which is supported by the case law of this Commonwealth" (R. 90).

tained in the Complaint itself, or must be affirmatively proved by the party alleging such jurisdiction.'" 427 Pa. at 389, 235 A. 2d at 403.

It is readily apparent that at the hearing on January 4, 1966, the union had no intention of seriously raising the issue of federal preemption. It presented no evidence to prove either that "the employer was engaged in interstate commerce" [19] or "that the challenged activities were expressly or arguably within the jurisdiction of the NLRB." The fact is, contrary to the requirement of proof so clearly set forth by the Supreme Court of Pennsylvania, that jurisdiction of the National Labor Relations Board is altogether unascertainable from the complaint and the record in this matter.

In *Lay*, the Supreme Court of Pennsylvania held that the matter was subject to exclusive Labor Board jurisdiction. In doing so, it discussed in detail the preemption decisions of this Court.

It is clear therefore that the Supreme Court of Pennsylvania has extensive expertise on the subject of federal preemption in labor matters.[20] Had the union raised the defense, the court would have "addressed itself to the question." The detailed and thorough discussion of the pre-

[19] At the Hearing, the union cross-examined Weis' Assistant General Superintendent at length (R. 38-48). It would have been a simple matter to adduce evidence through him on the subject of interstate commerce, or to propose a stipulation.

[20] Similarly, its expertise extends to other areas concerning federal supersession. See that court's extensive analysis of this question in *Commonwealth* v. *Nelson*, 377 Pa. 58, 104 A. 2d 133, affirmed 350 U.S. 497, where, in finding federal supersession, it stated:

"(W)e are met at the outset with this question which was *pressed timely in the trial court, was urged upon the Superior Court on appeal and has been stressed before us.*" 377 Pa. at 64, 104 A. 2d at 136. (Emphasis added.)

emption question by the Supreme Court of Pennsylvania in *Lay* demonstrates the very reason for this Court's waiver doctrine. The state courts should be given the opportunity to evaluate and decide all of the litigants' arguments before this Court is called upon to make a determination.

C. *Since The Union Failed To Raise The Defense Of Federal Preemption Before The Supreme Court Of Pennsylvania, It May Not Be Raised Before This Court.*

In the leading preemption cases, this Court has consistently made clear the fact that the preemption defense had been raised in the state courts below and had not been waived or abandoned. *Vaca* v. *Sipes,* 386 U.S. 171, 173; *Hanna Mining Co.* v. *District 2, Marine Engineers Ass'n,* 382 U.S. 181, 187; *Hattiesburg Bldg. & Trades Council* v. *Broome Co.,* 377 U.S. 126; *Liner* v. *Jafco, Inc.,* 375 U.S. 301, 303; *Carey* v. *Westinghouse Corp.,* 375 U.S. 261, 263; *Division 1287, Bus Employees Ass'n* v. *Missouri,* 374 U.S. 74, 77; *Local 100, Plumbers' Union* v. *Borden,* 373 U.S. 690, 692; *Local 438, Construction Union* v. *Curry,* 371 U.S. 542, 545; *Smith* v. *Evening News Ass'n,* 371 U.S. 195, 196; *Marine Engineers Ass'n* v. *Interlake Steamship Co.,* 370 U.S. 173, 176; *Plumbers' Union* v. *County of Door,* 359 U.S. 354, 355; *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 238; *Guss* v. *Utah Labor Bd.,* 353 U.S. 1, 5; *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.,* 353 U.S. 20, 22. The consistent noting that the defense of preemption was raised below underscores its significance.

The instant case is unlike a diversity case in the federal district courts where the fact of diversity of citizenship is so fundamental that it cannot be waived. This is not a case where the issue is the basic elementary jurisdiction

of a court. Under the rulings of this Court, a state court through the exercise of its equity power can still issue injunctions in labor cases. *International Bhd. of Teamsters* v. *Vogt, Inc.*, 354 U.S. 284; *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131; *UAW* v. *WERB*, 351 U.S. 266; *Allen-Bradley Local 1111, United Electrical Workers* v. *WERB*, 315 U.S. 740. The Pennsylvania courts therefore had the power to act here.

The allegation that a court has exceeded its power, is a defense which, if not raised, is considered waived. This Court has held innumerable times that it will not entertain the defense that a state court has unconstitutionally exceeded its power, if such defense has not been first presented to the State Supreme Court. *Beck* v. *Washington*, 369 U.S. 541; *Wolfe* v. *North Carolina*, 364 U.S. 177; *State Farm Mut. Auto Ins. Co.* v. *Duel*, 324 U.S. 154.

There is no valid reason for this Court to change or modify its long standing policy, propounded in detail above, that defenses not raised in the State Supreme Court cannot be raised here. Accordingly, since the defense of federal preemption was not raised before the Supreme Court of Pennsylvania, it may not be raised here.

POINT VII

ASSUMING, ARGUENDO, THAT PREEMPTION MAY PROPERLY BE RAISED BEFORE THIS COURT, THE SUPREME COURT OF PENNSYLVANIA IS NOT PREEMPTED IN THE CIRCUMSTANCES OF THE INSTANT CASE.

A. *The Picketing Did Not Violate Any Section Of The Labor Management Relations Act.*

1. The complaint did not allege that the union had engaged in unfair labor practices.

The complaint alleged that the union caused large numbers of persons to congregate in front of the store and in the parcel pick-up area (par. 6). The complaint also alleged that a no-trespassing notice had been posted (par. 11), that the union had been advised of it (par. 10) but that, notwithstanding, the union continued to trespass (par. 12) (R. 8-10).

Nowhere in the complaint was there an allegation that the union had committed an act which constituted an unfair labor practice, nor were there any acts complained of which could be interpreted as constituting unfair labor practices.

2. The union's Motion to Dissolve did not specify any particular unfair labor practice.

In its Motion, the union only adverted to "an unfair labor practice," in its generic sense. Not until this matter reached this Court, did the union specify any particular section of the Act. It is obvious, therefore, that its belated particularization of two alleged unfair labor practices was an afterthought. The union made no argument and offered no evidence during the hearing as to what conduct it was claiming it had engaged in which constituted an un-

fair labor practice, nor what sections of the Act it was violating. This mute position should be contrasted with its extensive argument here (Brief for Petitioners, pp. 30-56.) Regardless of whether its failure to raise the defense of preemption constituted a waiver, its bare assertion—and nothing more—until here, is evidence, at the least, that heretofore it considered this defense jejune.

3. The asserted unfair labor practices are confined to two sections of the Act.

In the Appendix to its Brief, the union sets forth two sections of the Labor Management Relations Act on which it relies, Section 8(b)(4) and Section 8(b)(7). Therefore, "the first inquiry . . . must be whether the conduct called into question may *reasonably* be asserted to be subject to Labor Board cognizance." *Local 100, Plumbers' Union* v. *Borden,* 373 U.S. 690, 694. (Emphasis added.) We shall show that the union's conduct did not violate either section, either in fact or arguably.

(a) *Section 8(b)(4)*

The conduct which this Court has been asked to review was primary, not secondary. The picketing took place immediately in front of the Weis store, and the name "Weis Markets" was clearly identifiable on the signs (R. 89). The picketing was "for the purpose of informing the public of the terms and conditions of employment of the employees of Weis Markets, Inc. at said store . . ." (See Motion to Dissolve (R. 23).)

There was no allegation in the complaint, nor does the record reveal any attempt by the union to "induce . . . any (employee) to strike . . . or refuse to . . . perform any service;" nor did the union "threaten, coerce, or restrain any person," as provided in the statute.

The union concedes that *this* primary picketing did not violate Section 8(b)(4) of the Act. Its contention is that, if it is *required* to picket at the entrances to the shopping center, a "secondary situation" *might* be created. (Brief for Petitioners, p. 42.) It does not contend, however, that this "secondary situation" is unlawful. Nor does the union contend that it would not picket at the entrances, of its own volition. What it seeks to do is reserve to itself the option to picket at the storefront *and* at the entrances.

Of course, the issue is whether the picketing from December 17, 1965, through December 27, 1965 in front of the Weis store, was a secondary boycott.[21] This was the activity enjoined, not the subsequent picketing at the berms, which was permitted. Whether a "secondary situation" was created by the court's order is not the question, "(n)or will (this Court) assume in advance that a State will so construe its law as to bring it into conflict with the Federal Constitution or an Act of Congress." *Allen-Bradley Local 1111, United Electrical Workers* v. *WERB*, 315 U.S. 740, 746.

The union evinces a concern about the "entanglement of others" and "exposing neutral employers to picketing in a controversy not their own." (Brief for Petitioners, p. 42, 55.) It lists seventeen enterprises presently occupying the center. (Brief for Petitioners, p. 3.) This of course does not appear in the record; if this be so, it may be noted

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[21] The National Labor Relations Board (unlike the union) apparently contends that the picketing in front of the store, "might be . . . proscribed by Section 8(b)(4)(B) of the Act." Its thesis is that "since the shopping center where the picketing was conducted had employers other than Weis, the Union was obligated to conduct its picketing with due regard for the right of those other employers. . . ." (Brief for National Labor Relations Board, p. 8.) It is possible that this statement was inartistically drawn and that the Board was referring to the picketing that took place after the issuance of the injunction.

that from the time the trial court directed the picketing to the four entrances to the center on December 27, 1965, until the picketing ceased on June 8, 1967, none of these tenants had filed an unfair labor practice charge objecting to the picketing. Moreover, Logan, the owner, has raised no objection. It is before this Court seeking affirmance of the decision below.

That the unions professed concern about neutral employers is a stratagem, is evidenced by its statement at page 44 of its Brief where it states, inconsistently, "if the picketing at the common situs is otherwise primary, *it is of no moment that neutral employers may suffer* because the picketing, though properly circumscribed, may nevertheless envelop their operations." (Emphasis added.)[22]

(b) *Section 8(b)(7)*

This section condemns, as unlawful, picketing for recognition—i.e. picketing "where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization." Was the object of the union's picketing "to force or require Weis to recognize or bargain with it?" The answer must be negative. The complaint con-

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[22] The union cites *Honolulu Typographical Union No. 37* (Hawaii Press Newspapers), 167 N.L.R.B. No. 150, as support for its argument that picketing outside of a shopping center presents questions of secondary activity. In *Honolulu,* a union had a "dispute" with a newspaper publisher (the primary employer). In aid of this primary dispute, it attempted to exert secondary pressure (picketing) upon five advertisers, whose businesses were located within a shopping center. The instant matter is not concerned with primary and secondary employers. The only employer involved is Weis. The union is not picketing Weis because it has a dispute with any other employer. The union in *Honolulu* also parked a flat bodied truck in front of the shopping center, upon which a series of Hawaiian, Tahitian and Samoan musicians and dancers gave free performances. We trust that this is not the type of activity the union is suggesting should be permitted to take place in the parcel pick-up zone in front of Weis' store.

tained no such allegation and there was no evidence to this effect in the record. On the contrary, the union alleged that the picketing was "nothing more than . . . informational picketing . . . for the purpose of informing the public . . ," (R. 22-23).

Further condemned as unlawful is organizational picketing, i.e. picketing "where an object thereof is forcing or requiring the employees of the employer to accept or select such labor organization." Was the object of the picketing to "force or require the employees of Weis to accept the union?" Again, the answer must be negative. There was no such allegation in the complaint. Furthermore, the record is completely barren of any reference to organizational activity on the part of the union, such as the solicitation of signatures from Weis employees on authorization cards, conversations with them by union representatives, on or off the picket line, seeking their support or affiliation, or any of the numerous other ways in which a union organizes. On the contrary, as asserted by the union, the picketing was "nothing more than . . . informational picketing . . . for the purpose of informing the public . . ." (R. 22-23). This limited purpose has been consistently set forth by the union in its argument before the lower courts and here.

In its Brief to the trial court, the union stated:

> "The activity complained of . . . amounts to nothing more than peaceful, informational picketing by union members for the purpose of informing the public. . . ." (Brief, p. 1.)
>
> "The pickets here involved have been carrying signs directed to the public. . . ." (Brief, p. 3.)
>
> "Such a message is designed to inform the public only. Such a message may be embarrassing to Weis . . . how-

ever, there is certainly no element of coercion on them to compel their employees to join a union." (Brief p. 3.)

In its Brief to the Supreme Court of Pennsylvania, the union stated:

"The activity complained of by the appellee amounts to nothing more than peaceful, informational picketing. . . ." (Brief, p. 7.)

"It is further quite clear that . . . (the) picketing is for the purpose of inducing plaintiff's customers to discontinue patronage. . . ." (Brief, p. 8.)

"It therefore appears that mere information picketing by union members for the purpose of informing the public. . . ." (Brief, p. 9.)

"The pickets here involved have been carrying signs directed to the public. . . ." (Brief, p. 10.)

Again, in its Brief here, the union described the purpose of its picketing as:

"peaceful picketing . . . informing the public. . . ." (Brief for Petitioners, pp. 2, 55.)

Finally, the union representative, when asked to describe "what type of picketing it is" testified that "it is strictly informational directed to the public" (R. 54).

Thus, the fact that the picketing was "informational" as contrasted with "organizational" or "recognitional" precludes the finding of an 8 (b)(7) violation. For "the thrust of all the Section 8(b)(7) provisions is only upon picketing for an object of recognition or organization, and not upon picketing for other objects." *International Hod Carriers,*

Local 840 (C.A. Blinne Const. Co.), 135 N.L.R.B. 1153, 1159.[23]

In its *amicus* brief, the Board acknowledges that informational picketing does not violate 8(b)(7)(C):

> "Moreover, if the picketing were found not to be recognitional or organizational in nature, but merely to protest the failure of Weis to conform to working standards prevailing in the area,[24] the picketing would not be within Section 8(b)(7)(C) at all. See *Houston Bldg. & Construction Trades Council (Claude Everett Construction Co.)*, 136 NLRB 321." (Brief for the National Labor Relations Board, p. 8.)

Thus, the union did not even arguably violate any section of the Labor Management Relations Act when it picketed in the parcel pick-up zone. The state courts were, therefore, not preempted by Federal law from acting.

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[23] "The principal requirement for an 8(b)(7) violation is that 'an' object of the picketing be 'forcing or requiring' the employer to recognize the picketing union as his employees' bargaining agent, or 'forcing or requiring' the employees to organize as members of the union." *NLRB* v. *Suffolk County District Council of Carpenters*, Docket Nos. 31151, 31152, 2d Cir., December 13, 1967, p. 649.

[24] It should be noted that the picket signs did not, *in haec verba* "protest the failure of Weis to conform to working standards prevailing in the area." The signs stated that: "(Weis) employees are not receiving union wages or other union benefits" (R. 89). This was true. Weis employees were not receiving wages or benefits resulting from union representation. Their wages were higher, and their benefits greater.

B. *Many Areas Of Labor Activity Remain Subject To State Regulation.*

Through the "process of litigating elucidation" this Court has "translated into concreteness" "what has been taken from the States and what has been left to them." *International Ass'n of Machinists* v. *Gonzales*, 356 U.S. 617, 619.

Of course, "the Taft-Hartley Act undoubtedly carries implications of exclusive federal authority. Congress withdrew from the States much that had theretofore rested with them. *But the other half of what was pronounced in Garner —that the Act 'leaves much to the states'—is no less important.*" *International Ass'n of Machinists* v. *Gonzales, supra*, at 619. (Emphasis added.)

We shall show that the "implications of exclusive federal authority" do not extend to the narrow area in which this state court acted. We shall show that "the regulated conduct touched interests . . . deeply rooted in local feeling and responsibility. . . ." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 244. Finally, we shall show that there was no transgression by Pennsylvania upon national labor policy. Therefore "in (view of) the absence of compelling congressional direction," this Court will "not infer that Congress had deprived (Pennsylvania) of the power to act." *San Diego Bldg. Trades Council* v. *Garmon, supra*, at 244.

We start with a review of this Court's decisions holding that where activity is either a "peripheral concern of the Labor Management Relations Act," "deeply rooted in local feeling and responsibility," or there exists an "overriding state interest," the State may regulate it. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236; *Local 100, Plumbers' Union* v. *Borden*, 373 U.S. 690.

1. State court action for libel published during union organizing campaign.

This Court held that the exercise of state jurisdiction over malicious libels would be of "peripheral concern" to the Labor Management Relations Act. In addition, this Court recognized "an overriding state interest" in protecting its residents from malicious libels. *Linn* v. *United Plant Guard Workers,* 383 U.S. 53, 61.

2. State court action by employees for malicious interference with lawful occupation.

This Court held that:

"(A)n employee's right to recover, in the state courts, *all* damages caused him by this kind of tortious conduct cannot fairly be said to be preempted without a clearer declaration of congressional policy than we find here." *International Union, UAW* v. *Russell,* 356 U.S. 634, 646. (Emphasis in original.)

3. State court action by employee for wrongful expulsion from union membership.

This Court held that:

"(T)he potential conflict (between a state court's award of damages and restoration to membership, and an NLRB proceeding) is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member." *International Ass'n of Machinists* v. *Gonzales,* 356 U.S. 617, 621.

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4. State action prohibiting mass picketing and interference with free use of public streets and sidewalks.

This Court noted that it was dealing with:

"a State . . . exercising its historic powers over such traditionally local matters as public safety and order and the use of streets and highways. . . . We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard."

* * *

"(W)e (cannot) say that the control which Congress has asserted over the subject matter of labor disputes is so pervasive . . . as to prevent Wisconsin . . . from supplementing federal regulation in the manner of this order."

* * *

"(T)he state system of regulation . . . can be reconciled with the federal Act and . . . the two . . . can consistently stand together. . . ." *Allen-Bradley Local 1111, United Electrical Workers* v. *WERB,* 315 U.S. 740, 749-51.[25]

5. State court regulation of organizational picketing directed toward supervisors.

This Court stated that "secondary pressure wielded to impose representation on unwilling supervisors, finds itself at that far corner of labor law where . . . federal occupation is at a minimum and state power at a peak." *Hanna Mining Co.* v. *District 2, Marine Engineers Ass'n,* 382 U.S. 181, 193, n. 14.

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[25] In *UAW* v. *WERB,* 351 U.S. 266, 274, this Court stated that: "The fact that the Labor Management Relations Act covered union unfair practices for the first time does not make the *Allen-Bradley* case obsolete."

6. State court action by employee alleging breach of union duty of fair representation.

This Court stated that it could not assume "that Congress, when it enacted N.L.R.A. Sec. 8(b) in 1947, intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative." *Vaca* v. *Sipes*, 386 U.S. 171, 183. Citing *Linn, Russell, Gonzales, Allen-Bradley,* and *Hanna,* this Court stated that these cases:

> "demonstrate that the decision to preempt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies. *Vaca* v. *Sipes, supra* at 180.

7. State Board action based on violence.

This Court stated:

> "The States are the natural guardians of the public against violence. It is the local communities that suffer most from the fear and loss occasioned by coercion and destruction. We would not interpret an act of Congress to leave them powerless to avert such emergencies without compelling directions to that effect." *UAW* v. *WERB*, 351 U.S. 266, 274-75.

8. State court action based on violence.

This Court held:

> "If petitioners were unorganized private persons conducting themselves as petitioners did here, Virginia would have had undoubted jurisdiction of this action against them. The fact that petitioners are labor organizations, with no contractual relationship with re-

spondent or its employees, provides no reasonable basis for a different conclusion." *United Construction Workers* v. *Laburnum*, 347 U.S. 656, 669.

9. State court action by employee against employer for breach of union contract.

This Court stated:

"If . . . there are situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice, we shall face those cases when they arise. This is not one of them . . . ." *Smith* v. *Evening News Ass'n*, 371 U.S. 195, 197-98.

We submit that the rationale of these cases establishes that there is no basis for extension of the preemption concept to the circumstances of this case.

C. *Pennsylvania's Deeply Rooted Interest In Protecting The Property Of Its Citizens Should Not Be Abrogated.*

The Supreme Court of Pennsylvania expressed the State's deeply rooted feelings with respect to regulating the use of property, as follows:

> "That the Commonwealth has not only the *power* but the *duty* to *protect* and *preserve* the property of its citizens from invasion by way of trespass is clear beyond question. *Thornhill* v. *Alabama*, 310 U.S. 88, 105. . . ." (R. 104). (Emphasis added.)

The citation of *Thornhill* reveals the origin of the words "power," "duty," "protect" and "preserve." For it was in *Thornhill* that this Court underscored state authority to regulate the use of property:

> "The *power* and the *duty* of the State to take adequate steps to *preserve* the peace and to *protect* the privacy, the lives, and the property of its residents cannot be doubted." 310 U.S. 88, 105. (Emphasis added.)

The choice of these 'words of power' by the Supreme Court of Pennsylvania, standing alone, reflects the depth of its feelings and interest.

The National Labor Relations Board concedes that "a State has a legitimate interest in protecting private property against trespass," but argues reversal because "here the State is not undertaking to protect its citizens against unwanted intruders in the customary sense. . . ." (Brief for the National Labor Relations Board, p. 17.) On the contrary, the Commonwealth's statement that it has "the duty to protect and preserve the property of its citizens from invasion" (R. 104) reflects its understanding of its obliga-

tion. Certainly, the Supreme Court of Pennsylvania is acting in the customary sense when it protects its citizens' property interests from trespass.[26] This strongly expressed interest should not be abrogated, for "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley* v. *Florida*, 385 U.S. 39, 47.

Furthermore, here the trial court enforced an injunction aimed narrowly at a trespass, but permitted the continuation of non-trespass picketing. It has been argued that this Court would approve such an injunction. In *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.*, 353 U.S. 20, the Ohio court's *broad* injunction against picketing within a shopping center was considered improper. This Court held that Ohio was clearly preempted from enjoining the union's conduct *"in its entirety."* However, it left open the question "whether a state may frame and enforce an injunction aimed narrowly at a trespass. . . ." It remanded for further proceedings, observing that "whether (the Ohio court's) conclusion as to the mere act of trespass would have been the same outside of the context of petitioner's other conduct we cannot know." 353 U.S. at 24-25.

It is possible, of course, that this Court did not want to reach and decide this question at that time. However, it may reasonably be argued, as did four members of the Washington Supreme Court, that "unless the court there (*Fairlawn Meats*) believed it possible to frame an injunction and enforce an injunction aimed narrowly at a tres-

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[26] States have resolved questions concerning real property since this nation was founded. The overriding interest of states in resolving disputes concerning the use of real property, and specifically the right of state courts to enjoin unlawful trespasses, cannot be disputed. See 43 C.J.S. *Injunctions*, §64 (1945), reporting 140 cases involving trespass actions instituted in 34 different states.

pass, it did a vain and useless thing in making a remand to the state court." *Freeman* v. *Retail Clerks Union*, 58 Wash. 2d 426, 434, 363 P. 2d 803, 807-08 (concurring opinion). Thus it may be said that this Court would not have remanded if a narrow injunction against trespass was preempted. Nor would this Court have remanded if the entire scope of the union's activity, including the trespass, were protected under Section 7 of the Act.

The Board concedes that "indoor picketing" [27] is not protected by the Act. In its *amicus* brief (p. 17) it stated:

> "Assume, for example, that outside organizers or pickets entered the selling area of the Weis store and disrupted its business. The interest of the State in providing a remedy for that conduct is so great and the danger of interference with the federal regulatory scheme is so slight that the State would not be barred from acting, notwithstanding that a federal remedy might also be available."

As stated at page 11, *supra,* the pickets interference with the merchandising operation in the parcel pick-up zone was as much a disruption of Weis' business, as would be their entrance into the selling area. If the protection of the Act did not extend to picketing in the selling area causing a disruption of business, it similarly did not extend to the disruption of business caused by pickets in the parcel pick-up zone.[28] The State's interest is so great and the degree of

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[27] The phrase "indoor picketing" is the Board's. See *Gimbel Bros., Inc.*, 100 N.L.R.B. 870, 877, cited in Brief for the National Labor Relations Board, p. 17 n. 16.

[28] Nor would the Act's protection extend to picketing on the porch. See comment by Supreme Court of Pennsylvania, that they "do not construe the Union's position to be that picketing on the porch of the Weis' property did not constitute a trespass" (R. 103, n. 5).

interference with the federal regulatory scheme so slight that the State courts should not be barred from acting here.

D. *There Was No Transgression Upon The National Labor Policy.*

The touchstone of most of the preemption cases before this Court is whether the state action might transgress upon the national labor policy. *Linn* v. *United Plant Guard Workers,* 383 U.S. 53.[29]

The "national labor policy" may be readily found in Section 1 of the National Labor Relations Act.

> "The policy of the United States . . . (is to) encourage the practice and procedure of *collective bargaining* and (to) protect the exercise by workers of full freedom of association, *self-organization* and designation of representatives of their own choosing. . . ." (Emphasis added.)

In this case we have an absence of collective bargaining or organizational activity. We have only informational picketing to communicate to the public that the employees in the store do not belong to the picketing union.

We do not even have a labor dispute. Logan was not involved in a labor dispute. The trial court noted: "Neither plaintiff Logan Valley Plaza, Inc. nor Sears are parties to a labor dispute nor involved in any labor trouble" (R. 90). Weis was not involved in any labor dispute. The

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[29] As one commentator has noted: "Nonetheless, the only variable in the formula is the interest asserted by national labor policy; any legitimate state interest, whether grave or trivial, will support state remedies given a less than substantial federal interest." Currier, *Defamation in Labor Disputes: Preemption And The New Federal Common Law,* 53 Va. L. Rev. 1, 11 n. 47 (1967).

trial court held that: "Weis . . . is not engaged in labor trouble" (R. 92). Furthermore, it was incontrovertibly testified that Weis was not involved in a labor dispute (R. 37). This absence of a labor dispute further distinguishes this case from other cases where this Court has found preemption.[30]

Furthermore, the parties to this action had no relationship, other than as litigants. Accordingly, there is "no need for concern over the climate of labor relations that (this) action might impair." *International Union, UAW* v. *Russell,* 356 U.S. 634, 656 (dissenting opinion). Thus on its facts, this case stands "at that far corner of labor law where . . . federal occupation is at a minimum and state power at a peak." *Hanna Mining Co.* v. *District 2, Marine Engineers Ass'n,* 382 U.S. 181, 193 n. 14.

[30] This is not a case involving an "economic strike by employees, a sphere in which federal interest is especially pervasive." (*Hanna,* 382 U.S. at 193 n. 14, commenting on *Teamsters* v. *Morton,* 377 U.S. 252). Nor does it involve picketing to compel execution of a union shop agreement (*Garmon*), or picketing in the context of a jurisdictional dispute (*Weber* v. *Anheuser-Busch, Inc.,* 348 U.S. 468).

E. *Pennsylvania Should Be Permitted To Exercise Its Inherent Equity Powers.*

It cannot be denied that a state must be allowed to "exercise the historic powers over such traditionally local matters as public-safety and order, the use of streets and highways." *Allen-Bradley Local 1111, United Electrical Workers* v. *WERB*, 315 U.S. 740. To the same effect, see *International Union, UAW* v. *Russell*, 356 U.S. 634 (dissenting opinion).

Similarly, in *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131, 139, this Court sustained a state court injunction which, in part, prohibited the union from "obstructing or attempting to obstruct the free use of the streets adjacent to respondent's place of business, and the free ingress and egress to and from that property. . . ."

In the instant matter, the picketing created acute congestion, presented a hazard to customers, and obstructed their free ingress and egress from the store (R. 44). *Whether Weis' property in this case is considered private, quasi-public or public, Pennsylvania should have the right to guarantee to the public the free and uninhibited use and access to this property.*[31]

The equity jurisdiction of a local court is especially suited to the type of control, regulation and accommodation of interests that arise in this type of case. It is "on the scene" and is familiar with the premises. In seeking an accommodation, it can discuss the respective positions with counsel in chambers, and work out an acceptable formula for the location and number of pickets.

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[31] The Supreme Court of Pennsylvania expressly held that Weis' parcel pick-up zone was private, and not quasi-public, property (R. 104-106). We, of course, agree.

The trial court need not issue a "cease and desist" order prohibiting all picketing, as does the National Labor Relations Board when it prohibits picketing. The court can, and did, permit picketing to continue; it can limit the numbers and provide that entrances shall not be obstructed. This type of order is especially suited to the flexible handling of a local court of equity. As this Court has stated in another context: "(I)t can be doubted whether the Board brings substantially greater expertise to bear on these problems than do the courts. . . ." *Vaca* v. *Sipes*, 386 U.S. 171, 181.

There is further justification for permitting the state court to act in this case. A tort was committed—trespass. The state courts have so found, and it is not seriously disputed. The state court remedied the tort through its Order. The Board cannot remedy it at all. There is no unfair labor practice of trespass. Therefore,

> "To the extent . . . that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated." *United Construction Workers* v. *Laburnum*, 347 U.S. 656, 665.

Furthermore, the Board's inability to remedy the tort of trespass might lead to other untoward consequences—self-help. This Court adverted to such a possibility when it stated:

> "The fact that the Board has no authority to grant effective relief aggravates the State's concern since the refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the

victim to take matters into his own hands." *Linn* v. *United Plant Guard Workers*, 383 U.S. 53, 64 n. 6.[32]

In the instant matter, the Assistant General Superintendent of Weis advised the pickets that they were picketing on private property and requested that they picket on the berm of the road. The pickets disregarded this notice to desist and continued to picket as before (R. 32-33). The instant proceeding resulted.

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[32] The Supreme Court of Illinois made a similar observation in upholding the conviction of union representatives' trespass on a retail store's parking lot:

"When a person refuses to leave another's property after he had been ordered to do so, a threat of violence becomes imminent. The defendants were on property occupied by Sears, Roebuck and Company. The company's agent believing the defendants had no right to be on the property ordered them to leave three times. The defendants believing they had a right to be there refused to leave. At this point, the Company called the police. If the State had not taken charge of the situation, the Company would have had no alternative but to forcefully remove the defendants. We cannot know the amount of force that would have been necessary to remove them, but the threat of violence in such a situation is imminent." *People* v. *Goduto*, 21 Ill. 2d 605, 609-10, 174 N.E. 2d 385, 387, *cert. denied*, 368 U.S. 927.

CONCLUSION

This Court has observed in one case that the employer's "motive in asking help from the state is . . . merely a desire to keep its plant in operation." *International Union, UAW* v. *WERB,* 336 U.S. 245, 256.

This is all that Weis seeks. Its motive in seeking judicial aid is wholly defense. *It merely wants to keep its store in operation.*

Weis obtained relief from its ordeal on December 27, 1965. Had it been denied, and the trespass complained of continued, its newly opened store in Altoona, Pennsylvania, would today be **closed,** its business **terminated,** its customers **dispersed,** and its employees **discharged.**

These undesirable results were properly obviated by the Pennsylvania courts. We urge affirmance.

Respectfully submitted,

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